

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ANTHONY LEWIS,

Plaintiff,

v.

Case No. 06-4066-KGS

UFCW LOCAL 2,

Defendant.

MEMORANDUM AND ORDER

This matter comes before the court upon plaintiff Anthony Lewis's Motion to Alter or Amend Judgment or in the Alternative too Set Aside Judgment (Doc. 36). Defendant filed a response to plaintiff's motion (Doc. 39). No replies were filed and the time for doing so has expired. The court therefore deems this matter ripe for disposition.

Discussion

Plaintiff has moved to alter or amend the judgment pursuant to Fed. R. Civ. P. 59(e). A motion to alter or amend a judgment pursuant to Fed. R. Civ. P. 59(e) may be granted only if the moving party can establish (1) an intervening change in controlling law; (2) the availability of new evidence that could not have been obtained previously through the exercise of due diligence; or (3) the need to correct clear error or prevent manifest injustice.¹ Additionally, such a motion does not permit a losing party to rehash or restate arguments previously addressed or to

¹See *Brumark Corp. v. Samson Res. Corp.*, 57 F.3d 941, 948 (10th Cir. 1995); See also *Campbell v. Meredith Corp.*, 2003 U.S. Dist LEXIS 9409 at *2-*3 (D. Kan. June 3, 2003) (citing *Brumark*).

present new legal theories that could have been raised earlier.²

Upon careful review of plaintiff's motion, it does not appear that plaintiff is contending that there is an intervening change in law or new evidence available. Therefore, the only issue that remains is whether the court must alter or amend the judgment to correct clear error or prevent manifest injustice.³

In support of his motion, plaintiff first contends,

“This court stated that plaintiff [sic] case is breach of duty and unfair representation. This court also stated during the telephone conference that this case is a clear cut breach of contract.”

The court finds this ground to be insufficient to grant plaintiff's motion. Although not stated in so many words, the court construes plaintiff's argument to be one alleging that the court should have characterized plaintiff's claim as a state law breach of contract claim. The court disagrees. Plaintiff has offered no supporting facts or affidavits on this issue. Moreover, even if plaintiff had provided proof of such alleged details, the court nonetheless must overrule plaintiff's motion. Any characterization of a cause of action during a “telephone conference” is not controlling to this case as a matter of law. Rather, it is this court's view that the characterization of plaintiff's claim is controlled by the parties' own pleadings and stipulations on the record as well as by the relevant and controlling caselaw of this court in light of the facts of this case. In this case, prior to entry of the Pretrial Order, plaintiff in his Complaint stated,

The defendant inadequately and insufficiently represented plaintiff in any issue or grievance. Some issue[s] were not resolved, other issues were resolved on behalf of the company. Plaintiff was terminated from his former employer and defendant voted not to

²*Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996).

³*Brumark*, 57 F.3d at 948.

arbitrate his case.⁴

Plaintiff also states in his Complaint:

Plaintiff seek[s] \$75,000 which includes union dues, *inadequate representation* and collecting union dues and *not representing plaintiff adequately*.⁵

Further, in his response to defendant's motion for summary judgment (Doc. 24), plaintiff contends:

“[T]he defendant Union should have [represented] plaintiff by arbitrating a[n] unresolved grievance to an arbitrator instead of plaintiff filing action and getting the results the Union should have gotten by arbitrating the case.”

Additionally, the parties have stipulated that this case is a breach of the duty of fair representation in their agreed-to Pretrial Order, in which the parties jointly stipulate, “This is a Section 301 action involving claims of breach of the duty of fair representation.”⁶ Finally, as set forth in the court's Memorandum and Order granting summary judgment, the United States Supreme Court as well as the Tenth Circuit has routinely characterized actions of the type plaintiff brings to be breach of the duty of fair representation cases and not as a state law breach of contract claim.⁷ Under these circumstances, the court finds plaintiff's argument to be insufficient. The record and case law clearly indicate that actions such as the one plaintiff brings are most appropriately characterized as actions for breach of the duty of fair representation and not as state law breach of contract claims. Therefore, the court overrules plaintiff's motion on

⁴Complaint (Doc. 1) at p. 3.

⁵*Id.* at p. 5 (emphasis added).

⁶See Pretrial Order (Doc. 34) at p. 1.

⁷See *Del Costello v. Int'l Bhd. Of Teamsters*, 462 U.S. 151 (1983); *Hagerman v. United Transp. Union*, 281 F.3d 1189, 1997-98 (10th Cir. 2002)(citing *Del Costello*).

this ground.

Plaintiff next contends:

Plaintiff has argued during the entire proceeding that ‘Defendants had violated their own contract agreement by not arbitrating plaintiff’s grievance in accordance to Article XV.[’] Plaintiff has argued that point in all of his pleadings.

As the court has previously discussed, a motion pursuant to Rule 59(e) does not permit a losing party to rehash or restate arguments previously addressed or to present new legal theories that could have been raised earlier.⁸ The court finds plaintiff is essentially rehashing and restating prior losing arguments by contending that “plaintiff has argued during the entire proceeding” defendant wrongfully violated its own contract by not arbitrating plaintiff’s grievance.

Therefore, the court will overrule plaintiff’s motion on these grounds.

Next, plaintiff contends:

“This court does have jurisdiction to resolve the claim of contract violation. Plaintiff has been argueing [sic] throughout this entire proceeding ‘Defendant voted not to arbitrate plaintiff’s unresolved grievance in violation to Article XV (Exhibit A)[’].”

The court agrees with plaintiff that it has jurisdiction to resolve plaintiff’s claim.

However, as previously stated, motions brought pursuant to Rule 59(e) do not permit a losing party to rehash prior arguments. Plaintiff has again stated, “Plaintiff has been argueing [sic] throughout this entire proceeding ‘Defendant voted not to arbitrate plaintiff’s unresolved grievance in violation to Article XV (Exhibit A)[’].” In exercising jurisdiction over plaintiff’s claim, and upon a full review of the record, the court overrules plaintiff’s motion on these grounds as plaintiff’s motion is rehashing and restating prior arguments.

⁸*Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1332 (10th Cir. 1996).

Finally, plaintiff contends:

This court has resolved the statute of limitations argument but not the contract violation argument made by plaintiff.

The court finds this argument to be without merit. The court notes that it granted defendant's motion for summary judgment based upon a finding that plaintiff's claim was barred by the applicable statute of limitations. The purpose, policy, and functional effect of statutes of limitations are to provide a finite period of time during which a plaintiff must file a lawsuit. If, as here, a plaintiff files a lawsuit after the statute of limitations has expired on a claim, no further legal action may be brought, regardless of whether any cause of action ever existed.⁹ In other words, in order to reach the substantive merits of plaintiff's claim, as plaintiff requests, plaintiff would have first needed to show that his claim was filed within the applicable period of limitations. Because plaintiff could not make such a showing, the court ends its analysis at this stage. Therefore, the court overrules plaintiff's motion. As a matter of law, plaintiff's claim is barred by the statute of limitations.

Therefore, upon a thorough review of the record as well as the parties briefing, the court finds that plaintiff's Motion to Alter or Amend Judgement or in the Alternative to Set Aside Judgment (Doc. 36) should be denied. Accordingly,

IT IS THEREFORE ORDERED that plaintiff's Motion to Alter or Amend Judgement or in the Alternative to Set Aside Judgment (Doc. 36) is hereby denied.

⁹See BLACK'S LAW DICTIONARY 927 (6th ed. 1990)("[Statutes of limitations set] maximum time periods during which certain actions can be brought or rights enforced. After the time period set out in the applicable statute of limitations has run, no legal action can be brought regardless of whether any cause of action ever existed.").

IT IS SO ORDERED.

Dated this 11th day of April, 2007, at Topeka, Kansas.

s/ K. Gary Sebelius
K. Gary Sebelius
U.S. Magistrate Judge